Filed 6/18/19 In re A.H. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re A.H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.H., Defendant and Appellant.	A155788 (Solano County Super. Ct. No. J044262)

Defendant A.H. appeals from jurisdictional and dispositional orders entered after the juvenile court found true allegations that he was a minor in possession of a firearm, a felony (Pen. Code, § 29610) and a minor in possession of live ammunition, a misdemeanor (Pen. Code, § 29650). On appeal, defendant contends there was insufficient evidence he possessed or had control over a loaded gun and that the court abused its discretion in admitting a photograph solely for identification purposes. We affirm.

BACKGROUND

On an afternoon in September 2018, Fairfield Police Officer Troy Oviatt was in a marked police car conducting a security check at a high school when he noticed a green SUV, with three occupants, traveling southbound but crossing "the dashed line designating the northbound lanes." He followed the vehicle, and after visually determining it was speeding, executed an enforcement stop.

As the SUV pulled to the curb, Officer Oviatt "noticed the rear passenger inside the vehicle was bending forward, dipping forward, and his right shoulder moved towards the front-hand floor of the interior of the vehicle." A subsequent search of the interior revealed a backpack containing marijuana and a loaded magazine on the front passenger floor and a loaded handgun under the front passenger seat. A field sobriety test revealed the driver was under the influence. The driver was arrested, and the other two occupants, including A.H., were transported to juvenile hall.

Three days later, the district attorney filed a juvenile wardship petition against A.H. (Welf. & Inst. Code, § 602, subd. (a)), alleging one count of felony possession of a firearm by a minor (Pen. Code, § 29610) and one count of misdemeanor possession of live ammunition by a minor (Pen. Code, § 29650).[1] A.H. was detained and placed in juvenile hall. The court subsequently maintained A.H.'s detention status after a *Dennis H.*[2] hearing, where it determined there was "prima facie evidence" as to both counts.

Officer Oviatt was the only witness at the jurisdictional hearing. In addition to the testimony recited above, he testified that "[a]lthough the vehicle's windows were tinted [he] was still able to see inside of the vehicle and some of the activities of the occupants." He did not see either the driver or the front passenger bend forward.

Officer Oviatt stated "[s]light movements are normal" when someone is pulled over by police. "However, if somebody starts reaching around a vehicle, specifically bending forward and making movements like they are reaching for something or placing something somewhere, that is—that heightened the danger of the contact." Officer Oviatt therefore called for backup, which arrived in less than five minutes.

Upon approaching the driver's side, Officer Oviatt "smelled the odor of marijuana coming from the vehicle." The front passenger, T.L., admitted to possessing marijuana.

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[1] Count 2 was originally charged as a felony but this was later corrected and charged as a misdemeanor at the disposition hearing.

[2] *In re Dennis H.* (1971) 19 Cal.App.3d 350.

Officer Oviatt identified A.H. as the person sitting in the rear passenger seat directly behind T.L.

A search of the interior of the SUV revealed a backpack on the floor of the front passenger seat and a loaded firearm under the front passenger seat. The backpack was "against the front seat similar to if you were sitting in that vehicle it would be underneath your legs." Officer Oviatt found marijuana and a loaded magazine inside the backpack and the magazine fit the gun also found in the vehicle. The gun "was sitting in the center area underneath the [front passenger] seat with the barrel pointed forward and the grip or the rear of the handgun towards the rear of the vehicle." Officer Oviatt stated, based on his experience, "typically people who are holding handguns, they hold it by the grip of the handgun," and because of the gun's placement and A.H.'s "movements" inside the vehicle, he concluded the gun "was placed underneath the passenger seat" by A.H. He acknowledged that before he pulled the SUV over, he would "not have noticed, slight movements of the hand, repositioning of the arms, movement or shuffling of the feet," and he would not have noticed if the front passenger "kick[ed] the backpack around by his feet." However, he maintained he would have "absolutely noticed and taken note of the passenger reaching or placing any items underneath the passenger seat of that vehicle while I was behind it."

After hearing from both counsel, the court observed this was not "a direct evidence case. It's a circumstantial evidence case from which reasonable inferences can be drawn, and the reasonable inferences that I am drawing in this case" weighed against defendant. The court explained the inferences it drew as follows: (1) the "activity of [A.H.] in the interior of the vehicle was consistent with an effort to disguise or dispose of something in his possession. The dipping movement, the reaching down movement, again, from the officer's perspective, is something that leads him to a heightened concern and a heightened scrutiny about what's going on, what's happening in the interior of the vehicle"; (2) "the position of the weapon in the vehicle and manner in which it was seated in relationship to all three of the occupants in the vehicle. It is consistent with, again, a person reaching down and disposing of the weapon in a manner that it landed in essence

exactly how you would expect a person to place a weapon, and then if necessary push it forward, even with a foot. . . . [¶] The gun magazine faced the passenger door, the sights faced the driver, the barrel was correctly pointed forward. The grip of the gun was pointed directly back to [A.H.]"; and (3) "the presence of the backpack. The absence of the backpack probably would have led to a much difference outcome. . . . The presence of the backpack, . . . would take a great deal of gyrations . . . , and again, the inference that can be drawn from that is that that backpack precluded the right [front] passenger from . . . dropping [the gun], kicking it back, going through it's gyrations of replacing the backpack and blocking the view of its presence." The court further stated that the magazine in the backpack "would have allowed the Court if this were tried together to draw an inference that the weapon was jointly possessed by [T.L.] and [A.H.] under the circumstances."

The court therefore found the People had met their burden, found the allegations true and set the matter for a disposition hearing. At the disposition hearing, the court adjudged defendant a ward of the court and committed him to juvenile hall for 56 days (with 26 days' credit and with the discretion that 30 days could be served on electronic monitoring in lieu of juvenile hall).

DISCUSSION

Possession of Firearm and Ammunition

Defendant contends there is insufficient evidence he physically possessed the loaded gun or had any authority or control over it.

" 'The standard of appellate review for determining the sufficiency of the evidence is settled. " 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' " (*People v. Howard* (2010) 51 Cal.4th 15, 33–34.) "The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the

sufficiency of the evidence to support a criminal conviction." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605.)

Penal Code section 29610 provides: "A minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 29650 provides: "A minor shall not possess live ammunition."

"Possession may be actual or constructive. Actual possession means the object is in the defendant's immediate possession or control. A defendant has actual possession when he himself has the weapon. Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.) Possession may be shared with others. (*In re Jorge M.* (2000) 23 Cal.4th 866, 888.) But mere proximity to a weapon, without more, is not sufficient evidence of possession. (*People v. Land* (1994) 30 Cal.App.4th 220, 223–224.) Finally, possession can be shown by circumstantial evidence and may be inferred from the defendant's conduct and possession for even a limited time and purpose may be sufficient. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 621–622; *People v. Neese* (1969) 272 Cal.App.2d 235, 245.)

Defendant cites several cases as "instructive" and maintains the juvenile court's findings were improperly "based on a chain of speculative inferences," contending the "mere possibility [he] had the right to control the gun is not enough to support a finding that he possessed it."

In *People v. Sifuentes* (2011) 195 Cal.App.4th 1410,[3] for example, police entered a hotel room to find Sifuentes laying face down on top of a bed nearest to the door. His codefendant was kneeling on the floor near a second mattress. When ordered to raise his hands, the codefendant "raised only his left hand and looked down at his right, with his arm bent at the elbow." (*Id.* at p. 1414.) Police later found a loaded firearm under the mattress near the codefendant. (*Ibid.*) In reversing Sifuentes's conviction for unlawful

[3] Disapproved on other grounds as stated in *People v. Farwell* (2018) 5 Cal.5th 295, 304, footnote 6.

possession of a firearm, the appellate court noted the only evidence offered to prove he had a joint right to control or constructive possession of the weapon was expert testimony that Sifuentes and the codefendant were members of the same gang and that a "gang gun" was accessible to members " 'at most times,' " subject to " 'certain restrictions.' " (*Id.* at pp. 1417–1418.) However, there was no evidence as to what those restrictions were, whether the gun in question was a "gang gun," or whether the room was being used for gang purposes. (*Id.* at pp. 1417–1419.) The court stated "[t]he possibility Sifuentes might have had the right to exercise control over the gun does not by itself provide a basis to infer he had the right to control it." (*Id.* at p. 1419.) Here, in contrast, there was direct evidence as to defendant's location and movements in the SUV and other circumstantial evidence, including the position of the backpack against the front passenger seat and the position of the gun, supporting an inference that defendant had leaned over and, from the rear passenger seat, had shoved the loaded firearm under the front passenger seat.

In *People v. Glass* (1975) 44 Cal.App.3d 772, 774, the appellate court reversed a conviction of possession of amphetamines for sale. In that case, police officers entered a residence and found the defendant lying on a bed half covered by a blanket. When the defendant saw the officers, he "pulled the bed covers over his entire body." (*Id.* at p. 775.) Police ordered the defendant to sit on a couch in the living room, and upon sitting on the couch, the defendant "made some movement with his feet." (*Id.* at pp. 775, 777–778.) A subsequent search of the house revealed "amphetamines found in and around the bed where [the defendant] had been lying," and a large amount of amphetamines under the couch in the living room. (*Id.* at pp. 775–776.) The Court of Appeal concluded the amphetamines found in the bedroom supported a conviction for simple possession, but not possession for sale. (*Ibid.*) However, as to the amphetamines found under the couch, there was no evidence the defendant resided or jointly possessed the home—in fact evidence suggested the contrary. As for the asserted movement of defendant's feet, the court concluded that "[i]n the absence of a more precise description of the movement," "it would be pure speculation to deduce that the officer . . . intended to

convey the notion that [the defendant] was attempting to conceal the contraband." (*Id.* at p. 778.) Here, in contrast, the officer making the traffic stop provided a detailed description of defendant's movements and did intend to convey that defendant was either attempting to conceal or retrieve a weapon. Further, the officer testified the position of the backpack against the front passenger seat and the position of the gun indicated defendant had pushed the firearm under the front passenger seat. Additionally, the gun remained within ready access by defendant.[4]

In sum, sufficient evidence supports the juvenile court's true finding of felony firearm possession.

Admission of Photograph for Identification Purposes

During the jurisdictional hearing, defense counsel introduced a photo of the front passenger, T.L., with what appeared "to be a handgun or simulated handgun or something similar tied to the lanyard around his neck."

The prosecution objected to the photograph on foundational grounds stating, "I don't know who took that picture," and also on Evidence Code section 352 grounds stating, "I don't know why we need a picture of that young man with a gun around his neck. There is no relevance as to that gun. There is no testimony that it is the same gun or anything like that and I don't think the Court needs a picture of the person who was in the front passenger seat."

Defendant countered that the officer, Oviatt, had "identified the photograph of the young man as [T.L.] who was [in] the front passenger. I don't think we need to have the person who actually took the picture present to lay a foundation."

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[4] Defendant also cites *People v. Brown* (1989) 216 Cal.App.3d 596. In that case, the Court of Appeal reversed a conviction of causing injury while evading police pursuit. The officer in that case testified that while she had activated her overhead lights, she could not remember whether she had activated the red light, specifically—a required element of the offense. (*Id.* at pp. 599.) Thus, as the appellate court stated, there "was no testimony that established the color of the lights" and any inference the officer had activated the red light was speculation. (*Id.* at p. 600.) Here, in contrast, there is, as we have discussed, sufficient evidence to support the inferences drawn by the juvenile court.

The court allowed the photo for the limited purpose of identification, explaining there was "evidence of a photograph of [T.L.] giving someone the finger and holding some money and having what appears to be a gun hanging around his neck. But I don't know when it was taken, where it was taken or how it was taken . . . so there is a foundational issue in the Court's mind. [¶] So if you are asking was this the gentleman who was seated in the car, I will receive it for that limited purpose but not for anything else there is really a foundational issue." Defense counsel responded, "I understand."

On appeal, defendant contends the photograph of T.L. should have been admitted "without limitation" instead of solely for identification. He maintains this error was prejudicial because "there is more than an 'abstract possibility' that its unlimited admission would have tipped the scales in [A.H.'s] favor."

"Authentication of a . . . photograph, is required before it may be admitted in evidence. . . . [¶] . . . [T]he proof that is necessary to authenticate a photograph . . . varies with the nature of the evidence that the photograph . . . is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266–267.) A trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.)

Defendant relies on *In re K.B.* (2015) 238 Cal.App.4th 989, for the proposition that "[a]n incriminating photograph is sufficiently authenticated where a police officer identifies the individual picture." In that case, an officer was scanning Instagram, a social media site, when he saw the defendant in pictures with two other people posing with firearms. (*Id.* at p. 992.) He took note of K.B.'s clothes and the fact that in some pictures he had a firearm tucked into his waistband and there was a curtain made of camouflage material covering a window in some pictures. (*Ibid.*) The same day as the

officer saw the photographs, a probation search was performed. As officers arrived and announced their presence, someone threw two handguns from a window with curtains that matched the ones in the Instagram pictures. (*Ibid.*) K.B. and another juvenile were detained wearing the same clothing the officer had seen in the social media pictures he had viewed earlier in the day. (*Id.* at p. 993.) The other juvenile's cell phone was seized and revealed "what appeared to be screenshots of some of the pictures that [the officer] saw on Instagram earlier that day." (*Ibid.*) Photographs extracted from that phone were admitted into evidence over defense counsel's objections. (*Id.* at pp. 993–994.) On appeal, K.B. contended the photographs were not properly authenticated, as no one who testified was present at the time the photos were taken. (*Id.* at p. 994.) The court held the "foundation for admitting the photographs into evidence was provided by the investigating officers." (*Id.* at p. 997.) In so holding, the court observed all of the admitted photographs were obtained from the cohort's phone, the extracted images included screenshots of pictures that had been posted to Instagram and showed K.B. posing with firearms, K.B.'s screen name on the site was "40glock_," a generated report showed the photographs had been created the same day the officer saw them posted and the search took place, the officer testified the photographs taken from the cohort's phone were the same as those he had observed earlier in the day on Instagram, and when K.B. was arrested he was wearing the same clothes in the photographs and was in the same location depicted in the photographs, and further he was with several of the individuals who appeared with him in the photographs. (*Id.* at pp. 997–998.)

To say that the case at hand is distinguishable would be putting it mildly. Here, Officer Oviatt simply testified that the individual in the photograph was T.L. That is a far cry from the showing made in *K.B.* to establish that the defendant in that case was in possession of a firearm. Nor does *K.B.* stand for the proposition that an officer's mere identification of a subject in a photograph is sufficient to admit the photograph for any purpose.

In any case, defendant has never stated the reason for which the photograph should have been admitted—either below or on appeal. Rather, he has simply maintained it

should have been admitted "without limitation." He likewise fails to show that limiting use of the photo was prejudicial. While he suggests this was perhaps a close case and had the juvenile court considered the photograph for all purposes it would have found differently, the record does not support this assertion. On the contrary, the court's discussion of its evidentiary ruling and its careful discussion of the evidence it considered, do not reflect a reasonable probability that the outcome would have been more favorable to defendant had the court considered the photograph for purposes other than identifying the juvenile in the front passenger seat. (See *People v. Watson* (1956) 46 Cal.2d 818.)

DISPOSITION

The orders are affirmed.

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Banke, J.

We concur:

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Humes, P.J.

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Margulies, J.

A155788, *People v. A.H.*